No. [illegible]

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Security-First National Bank of Los Angeles, as Executor of the Will of Benjamin Harrison Sheldon, Mae Sheldon and Robert Ho[illegible]ly,

Appellants and Cross-Appellees,

vs.

Eva S. Lowe, as Administratrix of the Estate of Walter A. Lowe, Deceased,

Appellee and Cross-Appellant.

OPENING BRIEF OF APPELLANT ROBERT HO[illegible]LY

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No. 18174

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SECURITY FIRST NATIONAL BANK OF LOS ANGELES, as Executor of the Will of Benjamin Harrison Sheldon, MAE SHELDON and ROBERT HOHLY,

Appellants and Cross-Appellees,

vs.

EVA S. LUTZ, as Administratrix of the Estate of Walter A. Lutz, Deceased,

Appellee and Cross-Appellant.

OPENING BRIEF OF APPELLANT ROBERT HOHLY.

Jurisdictional Statement.

Jurisdiction of the District Court was based upon diversity of citizenship and an amount in controversy which exceeds the sum of $10,000.00, exclusive of interest and costs. Appellee's decedent was a citizen of the State of Washington and each of the appellants is a citizen of California for diversity purposes (the action was commenced prior to the effective date of the 1958 amendment to 28 U. S. C. 1332) [R. 153-154].

Jurisdiction on appeal is based on 28 U. S. C. 1291.

Statement and Facts of the Case.

This cause comes up on appeal for the second time, after being remanded back to the United States District Court, Southern District of California, Central Division, by this Honorable Court, for the purpose of preparing new findings on the issue of damages. The first appeal is reported in 297 F. 2d 159, and is hereafter referred to as the Opinion.

Appellant Robert Hohly is one of three defendants who are again appealing the amount of the new judgment, and files this brief solely on his own behalf and for no other party.

Since the remand, the original appellee Walter A. Lutz died, and Eva S. Lutz, the administratrix of his estate, was substituted in his stead. Said administratrix, hereinafter called appellee, has also filed notice of an intention to cross-appeal.

The basic facts relating to this new appeal require little detail. In its Opinion, this Honorable Court found that appellant Security First National Bank of Los Angeles, in the representative role of executor of the estate of Benjamin Harrison Sheldon, hereinafter called Bank, was liable to appellee out of Ben Sheldon's estate for conversion perpetrated by Sheldon in respect to the proper proportion of Walter A. Lutz's interest as a limited partner in the B. H. Sheldon Co., a trailer manufacturing partnership, later incorporated under the same name. Appellant Mae Sheldon was found to be similarly liable.

Appellant Hohly, who was expressly found by this Court not to have profited personally from the acts of the other two appellants, was held liable for such

"neglect of duty" in preparing certain books and records, in his role as accountant for the partnership and corporate entities as, perhaps, to have made it possible for the perpetration of the conversions complained of against the other two appellants.

However, this Court remanded the cause back to the district Court on the theory that since the sum of the initial judgment against the appellants was evolved from appellee's theory that upon equitable principles appellee should be permitted to avoid the consequences of his consent to the subsequent incorporation, and thus treat the corporate entity as a continuation of the initial partnership, "equitable consideration must be given to the rights of (Ben) Sheldon, restored to him in the eyes of equity by that very avoidance" [Opinion p. 163]. Or, as this Court thereafter specifically defined the issue of "equitable consideration" of Ben Sheldon's rights: The precise matter to be determined, as was not done at the first trial, was "the reasonable value of the services rendered by Sheldon and the amount of compensation to which he was entitled [Opinion p. 165] in his role as chief executive of the trailer business. Concededly, as this Court noted [Opinion p. 165], "Sheldon received (some) salary and expenses from the corporation" [Opinion p. 165] while the business was maintained as a corporate entity; but Sheldon had received no salary whatsoever for the seven month period while the business was operated as a partnership and managed by Sheldon, as a general partner: "The Court: Now, there was no salary actually drawn for that seven month period . . ." [Tl. 70: 6-8].[1]

[1]The district court held two hearings following the remand, February 19, 1962 and March 19, 1962. No evidence was, how-

The precise dates when said seven month period commenced and terminated were July 1, 1954 to January 31, 1955; and the period of time relating to the corporate entity was from February 1, 1955 to Sheldon's death, March 3, 1956. The former period is hereinafter referred to as the seven month period and the latter as the thirteen month period, in accordance with the stipulation of all counsel and the district Court at the first hearing.

Appellant Hohly has been informed that appellant Bank intends to offer a more detailed statement of fact than is herein given and in the interest of brevity adopts such statement in respect to all factual matters herein omitted.

Specification of Errors Relied on.

1. The findings of fact filed by the district Court are not supported by the evidence.

2. The findings of fact filed by the district Court are vague, indefinite, contradictory and conclusionary.

3. The findings of fact filed by the district Court refute and deny matters which have already been settled by this Court on the first appeal and have become the law of the case.

4. The judgment against appellant Hohly is not supported either by the findings of fact filed by the district Court or by the evidence, and is erroneous and excessive.

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ever, taken at the first hearing. For convenience, all references to the transcript of the second hearing will be identified by the letter "T", followed by the page and line numbers referred to, separated by a colon. References to the first hearing will be preceded by the designation "T1"; and references to the Supplemental Transcript of Record on Appeal, containing pleading documents and exhibits filed subsequent to the remand, will be preceded by the designation "S.T."

Question Presented.

What remedies are open to, and will be afforded to, parties still aggrieved after a retrial, when although this Court has remanded a cause to a district Court for the express purpose of making findings of fact on certain issues, the district Court has failed to comply with the intended objective of the remand.

Summary of Argument.

After this Honorable Court remanded the cause back to the district Court on the issue of damages, to effect a "balancing of the equities" between the interests of Ben Sheldon and appellee's decedent, the district Court heard testimony on the reasonable value of Ben Sheldon's services as the executive officer in charge of all the operations of the trailer business. For convenience these services were related to two separate periods of time: a seven month period while the trailer business was conducted as a partnership, and a thirteen month period during which time the business was incorporated.

At the retrial appellee offered no evidence in respect to the value of Ben Sheldon's services during these periods. She did, however, call one witness who testified that "in the spring of '54 Ben Sheldon said he would not draw a salary." That was the full extent of the testimony.

Appellants, however, produced three expert witnesses. One reiterated his testimony offered at the first trial that Sheldon's services for the seven month period were worth $30,000 to $35,000 and $70,000 to $90,000 for the thirteen months. The second testified that the value of Sheldon's services should be placed at $22,000 for the seven month period and $71,500 for the thirteen

month period. The third expert testified that the services should be valued at $20,000 and $77,000 respectively, for the periods at issue.

At the conclusion of the retrial, the district Court filed its findings of fact which found the value of Sheldon's services to be in "a maximum not to exceed $600 per month" — or $4,200 for the seven month period and $7,800 for the thirteen months.

Patently, since the district Court actually heard no evidence whatsoever substantiating the mere $600 per month figure, it is apparent that the Court drew its own independent conclusion and arbitrarily adopted a figure to its own preference.

Findings which have no support in the evidence are, of course, erroneous and must be reversed on appeal. *United States v. United States Gypsum Co.*, 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746.

But actually, even this $600 per month figure, cited in some of the findings, is adversely contradicted and qualified in the same findings by limiting clauses, such as "assuming he (Sheldon) had an equitable right to any salary at all"; and still other findings of fact specifically hold that Sheldon was definitely not entitled to any salary whatsoever. Thus abject contradiction on the issue runs through the findings relating thereto.

The other findings of fact not specifically directed toward the matter of the value of Sheldon's services are similarly vague, indefinite, conclusionary and contradictory.

Findings of this type have often been criticized and reversed by this Court. See *Welsh Company of California v. Strolee of California, Inc.,* 290 F. 2d 509.

The errors in the findings of fact heretofore described are particularly prevelant in those other findings relating to the actual detriment suffered by appellee, and to the measure of damages to be assessed against appellant Hohly. Six different findings state some nine different sums purporting to be the detriment suffered by appellee; ranging from $15,300 to $126,760.-27. Then, the very last finding states that appellant Hohly is found liable for damages in the round sum of $55,000; an amount which remains totally unsupported and unsubstantiated by a single figure or computation to be found anywhere throughout all the findings of fact.

Clearly, such a veritable mish-mash of figures and declarations of detriment and damage fails to afford appellant Hohly any possible means of determining how the actual damage total of $55,000 has been evolved.

Nor is this Court, on appeal, in any better position to understand, from the confused and contradictory figures in the findings, how the $55,000 damage figure was reached. Findings in such a form have been criticized and remanded by this Court in *Daido Line v. Thomas P. Gonzalez Corp.,* 299 F. 2d 669, and other decisions.

Certain of the findings of fact are further in error in that they now deny that while balancing the equities

Ben Sheldon should be credited with a loan to the business in the sum of $57,200, which was never repaid. Although original finding of fact 20, filed by the district Court after the first trial, unequivocally finds that said sum was a loan, not repaid, new finding of fact 11, filed by the district Court after remand, now finds that "such $57,200. is not a loan, nor a proper equitable offset".

Actually, since this Court has already itself determined in its Opinion that the $57,200 was a loan, and must be given consideration while balancing the equities, and since no new evidence was taken on this matter on retrial, the pronouncement by this Court has become the rule of the case, and cannot now be contrarily decided by the District Court. See *Thompson v. Maxwell Land Grant & Railway Company,* 168 U. S. 451, 18 S. Ct. 121, 42 L. Ed. 539.

As shown, appellant Hohly has been found liable for a judgment in the sum of $55,000 without any justification for such in the evidence heard by the district Court or from the computations on damages made in the findings of fact. Actually, this damage sum totals some $8,500 more than appellant Hohly was assessed in the first judgment, even including the sum of $15,000 for exemplary damages therein assessed against him.

Thus, although this Court reversed the award of punitive damages against appellant Hohly, he is now in a considerably worsened position, in respect to the total

liability assessed against him by the district Court, then he was even before his successful appeal.

The new judgment is clearly excessive and should be reversed.

However, in the interest of bringing an end to this litigation, which has now extended some four and one-half years from the time it first came to trial, all three defendant appellants herein have conferred and have agreed that the proper measure of damages to be assessed against them, jointly and severally, is the sum of $18,094.40. The formula from which this sum is evolved is given in detail in the Argument in this brief.

If this Court desires, it may, as did the Second Circuit in *Alexander v. Nash-Kelvinator Corporation*, 261 F. 2d 524, finalize the amount of damages for itself and order a remittitur in this amount, without need for any further remand. In the *Alexander* case, the Court followed this procedure, after a similar second appeal following an initial remand on the issue of damages.

ARGUMENT.

I.

The Findings of Fact Are Not Supported by the Evidence.

Undisputedly, as this Court, the district Court, and all parties have recognized, the precise factual issue to be determined at the new trial, in order to "balance the equities" and properly to assess damages, was the proper amount of salary to which Ben Sheldon was entitled for the seven month period (for which he had drawn no salary) and the thirteen month period for which he had drawn some $76,800 [T1. 49: 8-9].

Accordingly, at the second hearing, more accurately described as the new trial, evidence was offered on this issue of the value of Sheldon's services. Because appellant Hohly is urging as a major ground on appeal that the supplemental findings of fact[2] are not supported by the evidence (as well as being legally objectionable on other grounds, see *infra*), it is believed to be essential that the actual evidence heard by the district Court be reviewed. (Objections to the findings of fact were made to the District Court by appellants [S. T. 584-590], but these were denied).

Appellee's Witnesses.

Appellee called three witnesses: Dean Sidney Curtis, Julius Leonard Merrifield and Donald Richard Villee.

Dean Sidney Curtis: This witness, who had been a limited partner in the partnership enterprise, testified merely that "in the spring of '54" [T.

[2]The supplemental findings of fact are, of course, those filed by the district court after the retrial, as included in the new Clerk's Transcript.

7:3] Ben Sheldon said "that he would not draw a salary" [T. 6:24].

And this is the extent of the testimony offered by the witness on the point. Though it clearly appears from the tenor of the language of some of the supplemental findings of fact that the district Court has drawn the inference from such bare testimony that Ben Sheldon was therefore *not entitled* to receive any salary whatsoever at any time, clearly such an inference is not supported by the bare statement of the witness heretofore cited. Patently the testimony given fatally lacks detail as to for what period of time Sheldon purportedly intended not to draw a salary (perhaps it could have been for one week); and when Sheldon changed his mind—since there is undisputed evidence that subsequently Sheldon did receive some salary.

> *Julius Leonard Merrifield:* This witness, an employee of the trailer business, gave no testimony whatsoever about the value of Ben Sheldon's services; and appellee's counsel's questions on direct, and the witness' answers, were substantially irrelevant — being directed almost exclusively toward explaining what the witness' own duties were in the business.

On cross-examination, however, this witness admitted the following in respect to *Ben Sheldon's* duties in the operation of the business:

1. Sheldon was the chief executive officer of the business entities [T. 22:1-6] and [T. 24:13-15].

2. Sheldon exclusively contacted dealers to franchise the manufactured trailers and arranged for the manu-

facture and delivery of the units to the franchised dealers [T. 22:16-22].

3. Sheldon negotiated all the agreements and contracts with the dealers [T. 22:23-25].

4. Sheldon participated in the design of the trailers [T. 24:24 to 25:1].

5. Sheldon was the chief financial officer for the business, made arrangements for the finances and "saw where the money came from that paid the bills" [T. 25:2-7].

6. Sheldon assumed full responsibility for the conduct of the business [T. 25:8-11].

7. Although the witness' services to the business were confined to a subsidiary role in sales and purchasing [T. 17:1-4] (a very small part of the overall operation), the witness himself received a salary which averaged $650 per month [T. 25:16-21].

> *Donald R. Villee:* This witness, an accountant, who was called in by appellee to examine some of the business books and records, also gave no testimony whatsoever about the value of Ben Sheldon's services. His chief testimony concerned an entry he had found in the books which disclosed a salary payment of $4,776.07 to Sheldon during the month of February, 1955.

Appellants' Witnesses.

Appellants called three witnesses: Robert Hohly, James Leroy Harner and Page E. Golsan.

> *Robert Hohly:* Appellant Hohly, who had been the accountant for the business, testified to the following matters relating to Ben Sheldon's services:
>
> 1. Prior to the commencement of the seven

month period, there had been 84 employees in the business and by the time of Sheldon's death there were 282 [T. 49:23 to 50:1].

2. One L. B. McKinney, merely an administrative assistant to Sheldon, drew a salary of $76,-389.44 during the full twenty months in issue [T. 51:4-8].

3. Sheldon exclusively contacted the individual trailer dealers, negotiated the sale of the trailers and handled the financing of the business enterprise during the entire twenty months in issue [T. 52:9-20].

4. At the end of the twenty month period, the trailer business was the largest on the Pacific Coast [T. 59:25 to 60:3].

(At the original trial Hohly had testified that "a salary from $30,000 to $35,000 would be reasonable" for the seven month period [R. 826] and $70,000 to $90,000 for the thirteen months [R. 825]; and the district court acknowledged this testimony at the February, 1962 hearing: "He said it was $5,000 a month . . . That is in the record." [Tl. 62:4-6]).

James Leroy Harner: This witness, a consultant in the field of industrial relations pertaining to executive compensation (including the recommending of salary levels for executive personnel for client firms [T. 66:8-15]), testified, in answer to an opinion question which detailed Sheldon's duties and services to the business, that for the thirteen month period a reasonable salary for Sheldon would be $71,500 [T. 73:5-6] and for the seven month period, $22,000 [T. 74:1-3].

Page E. Golsan: This witness, a consulting management engineer [T. 79:22], who during his business life had reviewed 800 to 900 reports dealing directly with the compensation of top executives [T. 81:10-15] testified, in answer to a similar opinion question which reviewed Sheldon's duties and services, that $77,000 would be the reasonable value of Sheldon's services for the thirteen month period [T. 84:5-11], and $20,000 for the seven month period [T. 88:11-16].

The foregoing, then, is the entire testimony heard by the district Court on the subject of the reasonable value of Ben Sheldon's services. Nevertheless, the Court thereafter filed findings of fact 1(a), 7 and 9 [S.T. 600, 603, 604], in which it declared that "a maximum reasonable salary for B. H. Sheldon's services . . . under the circumstances in evidence does not exceed $600 per month."

Since it is clear, from a review of the foregoing testimony, that the district Court heard no evidence whatsoever to support the figure of merely $600 per month, it therefore must be assumed that the Court arbitrarily adopted that figure as its own personal conclusion. (And by what rationale the court did so; considering the undisputed testimony about Ben Sheldon's broad and extensive executive duties and services, offered even by appellee's witness, and the testimony that a subsidiary employee of the business had averaged $650 in salary and that an administrative assistant had been paid $76,-389.44 for the 20 months at issue, or more than $1,525 per month; frankly escapes appellant Hohly.)

Manifestly, findings of fact which have no support in the evidence cannot be recognized or upheld and must be reversed on appeal.

Indeed, the Supreme Court, in *United States v. United States Gypsum Co.,* 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746 (1948) has declared as follows, in respect to a finding which (unlike those at issue) had *some* support in the evidence; at page 395:

> "(T)his Court may reverse findings of fact by a trial court where 'clearly erroneous' . . . A finding is 'clearly erroneous' when although there is evidence to suport it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

This Court has frequently declared itself in accord with this pronouncement. See: *Riddell v. Guggenheim,* 281 F. 2d 836 (9th Cir., 1960); *American Eagle Fire Ins. Co. v. Eagle Star Ins. Co.,* 216 F. 2d 176 (9th Cir., 1954); *United States v. El-O-Pathic Pharmacy,* 192 F. 2d 62 (9th Cir., 1951).

II.

The Findings of Fact, in Particular Those Relating to the Measure and Amount of Damages, Are Vague, Indefinite and Contradictory.

Yet, at most, the district Court's findings only grudgingly concede even the $600 per month valuation to Ben Sheldon's services, and strongly qualify even this figure. Indeed, findings 7 and 9, which appear to commence with a clause recognizing the $600 figure, conclude with a negating qualification in this respect; which in finding 9 is given as: "assuming he had an equitable right to any salary at all." [S.T. 604:5-6].

Then the matter is further confused by findings 2, 4 and 6, which basically declare, in conclusionary form, that Ben Sheldon was actually not entitled to any salary for the periods in question. Indeed, finding 4 finds that: "Sheldon disclaimed and waived any right to salary, July 1, 1954 to March 3, 1956" [S.T. 602:4-5].

Under the circumstances, there can be little dispute that the various findings relating to the value of Sheldon's services are, at the very least, contradictory; and considering their indecisive and diffident language, it is questionable that they can be said to make any real finding on the issue at all.

The language of other findings of fact, particularly 1(b), 3, 5, 6, 7 and 8 [S.T. 597 through 603], appears to be similarly vague, indefinite, contradictory and conclusionary.

In *Welsh Company of California v. Strolee of California, Inc.*, 290 F. 2d 509 (9th Cir., 1961) this Court said, in vacating the judgment and remanding the cause, at page 511:

> "(W)e think it is the duty of the District Court to find the facts and not to leave to us the heavy chore of reviewing sundry, contradictory assumptions any of which could have led to the conclusory statements misnamed Findings of Fact in the present record.
>
> " 'Findings of fact are required under Rule 52(a), Federal Rules of Civil Procedure * * *. The findings should be so explicit as to give the appellate court a clear understanding of the basis of the trial court's decision and to enable it to determine the ground on which the trial court reached its decision' ".

In accord: *National Lead Co. v. Western Lead Products Co.,* 291 F. 2d 447, 451 (9th Cir., 1961); *Commercial Standard Insurance Co. v. Liberty Plan Co.,* 283 F. 2d 893, 895 (10th Cir., 1960).

But this error of unclear, indefinite and contradictory findings of fact is particularly prevelant at bar in respect to those findings which purport to define the actual detriment suffered by appellee, and thus the amount of damages to be assessed against the appellants. Compare the language of the following findings:

Finding 1(c) [S. T. 600:25-32] declares that one element of damage, the value of the shares of stock found to have been converted, should be $19,691.07.

Finding 1(d) [S. T. 601:2-10] declares that appellee was damaged to the extent of $15,300, "in addition to any other damages caused by the Sheldon's fraud herein found"; (but nowhere else in the findings is the "in addition" clause translated into actual dollars and cents — and indeed, the qualifying term "any" preceding the words "other damages" suggests that no such "other damages" are actually under contemplation).

Finding 12 [S. T. 604:29 to 605:14] repeats the sum of $15,300, but in this instance is followed by a different "in addition clause", which now suggests the addition to the $15,300 of an entirely different sum than might result from the "in addition" clause of finding 1(d): "in addition to plaintiff's damages for conversion of the securities". Again, this latter clause remains undefined in actual dollars.

Finding 12, *second half* [S. T. 605:15 to 606:1] (presumably intended to be finding 13, since there is no other 13), contains *three* different figures as purported

detriment suffered by appellee: $23,083.35, $112,675.-79 and $126,760.27, in turn.

Finding 16 [S. T. 606:13-23] declares the damages to be, insofar as appellant Hohly is concerned, an evenly rounded out $55,000.

Appellant Hohly respectfully asks in respect to all the foregoing findings: What is the *actual* detriment suffered by appellee? *How, and on the basis of what computation, is Hohly's liability determined to be $55,-000?*

Surely appellant Hohly has the constitutional right, before being compelled to pay the damages assessed, to be informed just how the sum of the damages was actually determined, and clearly, the findings of fact filed by the district Court woefully fail to provide such information.

And now that appellant Hohly has appealed the amount of the damages, how is this Honorable Court itself going to be able to decide, from the actual state of the findings of fact, whether the damages assessed are correct, proper and just? In *Alexander v. Nash-Kelvinator Corporation,* 261 F. 2d 187 (2nd Cir., 1958) wherein the same problem occurred, it is said, in remanding the matter on the issue of damages, at page 191:

> "This court is mindful of the principle so frequently reiterated that the question of the excessiveness of a jury verdict is to be determined by the trial court on a motion for a new trial. In such cases the trial court, in effect, occupies the position of a reviewing judge. He has the power to pass upon, set aside or even reduce by remittitur excessive awards. Where a case is tried by a judge

without a jury the defendant is deprived of this right. The first opportunity which an aggrieved defendant has in this respect in a non-jury trial is upon appeal. For these reasons it becomes most important that the trial court comply meticulously with the requirements of Rule 52(a) with respect to findings so that the appellate court can properly appraise the elements which entered into the award. Just as the trial judge passes upon possible passion or prejudice and all the other legal grounds for attacking excessive damages on the post-trial motion to set aside a jury verdict so on the appeal the appellate court should have some knowledge of the basis or theory upon which the trial judge acted. Without this information the defendant is unable properly to exercise the appellate rights conferred by statute and the court is equally unable to make appropriate appellate review."

And in *United States v. Horsfall,* 270 F. 2d 107 (10th Cir., 1959) it is said, at page 110:

"The difficulty here is that it is impossible from the findings to determine whether there has been a duplicate award for loss of earnings. Such uncertainty prevents the appellate court from making an intelligent review of the sufficiency of the evidence. The Supreme Court has said that there 'must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion of fairness can rationally be predicated'.* When the findings are

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*"Kelley v. Everglades Drainage District, 319 U. S. 415, 420, 63 S. Ct. 1141, 1144, 87 L. Ed. 1485. See also Dalehite v. United States, 346 U. S. 15, 24, note 8, 73 S. Ct. 956, 97 L. Ed. 1427."

> inadequate to permit a review of the sufficiency of the evidence they do not satisfy the principle so announced. There is a duty upon the court in a case tried without a jury to make proper findings and there is a duty on counsel for the prevailing party to see that proper findings are made and filed."

This Court has frequently similarly ruled See: *Farley v. United States,* 252 F. 2d 85, 88 (9th Cir., 1958); *Daido Line v. Thomas P. Gonzalez Corp.,* 299 F. 2d 669, 676 (9th Cir., 1962).

III.

The Findings of Fact Purport to Refute and Deny Matters Deemed Settled by This Court, in Derogation of the Rule of Law of the Case.

The findings of fact are further erroneous, in that they now purport to refute and deny one phase of the problem relating to the balancing of the equities between Sheldon and Lutz which has already been completely resolved — the requirement that Sheldon be credited with the $57,200 which he loaned to the partnership and which was never repaid.

Suddenly the district Court has reopened this subject in its findings, despite the fact that no new evidence was taken at the retrial in respect thereto; and has now declared in finding of fact 11 as follows [S. T. 604:25-28]:

> "Under all the circumstances of this case, I find that B. H. Sheldon has no equities to which he, or anyone claiming through him, is entitled. Such $57,200 is not a loan, nor a proper equitable offset".

Inconsistently, however, in its initial paragraph in the findings of fact [S. T. 599:29-31] the Court also states that it is reaffirming its original findings of fact 1 through 40 inclusive; including, of course, finding 20, which states as follows [R. 207]:

> "During the period from July 12, 1954 to January 25, 1955, Decedent made cash contributions to the partnership, B. H. Sheldon Company, in the total sum of $67,200.00, of which $10,000.00 was repaid to Decedent by said partnership, leaving a net or balance for said period of $57,200.00."

Aside from the error and contradiction of the district Court in this respect, the matter has anyhow already been deemed settled, insofar as this Court is concerned. In the Opinion, page 162, it is said:

> "(C)redit should be given him (Sheldon) for the sums owing. . . . The Court found that the sum of $57,200.00 was owing to Sheldon by the partnership for advances."

Clearly, this issue, upon which no new evidence was taken on retrial, has become the law of the case and cannot now be disavowed and contrarily decided by the District Court.

In *Thompson v. Maxwell Land Grant & Railway Company,* 168 U. S. 451, 18 S. Ct. 121, 42 L. Ed. 539 the Supreme Court has said at page 456:

> "It is the settled law of this Court, as of others, that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case. *Supervisors v. Kennicott,* 94 U. S. 498, and

cases cited in the Opinion; *Clark v. Keith,* 106 U. S. 464; *Chaffin v. Taylor,* 116 U. S. 567; *Northern Pacific Railroad Company v. Ellis,* 144 U. S. 458; *Great Western Telegraph Co. v. Burnham,* 162 U. S. 339, 343".

And in *Aetna Life Ins. Co. v. Wharton,* 63 F. 2d 378 (8 Cir., 1933) it is said at page 379:

> "It is a well-established rule that the decision of an Appellate Court is the law of that case on the points presented, to be followed in all subsequent proceedings in that case, in both the trial and the appellate court (Citations)."

IV.

The Judgment Is Not Supported by the Evidence and Is Unjust and Excessive.

In the Revised Judgment [S. T. 609:23-26] appellant Hohly has been found liable for the sum of $55,000. As has been shown, this figure is unsupported by any evidence or by any matter contained in the findings of fact; and appears to be an amount arbitrarily imposed and assessed by the district Court. Actually, *it represents a greater liability imposed on appellant Hohly now than was the original judgment,* even when the latter is augmented by the punitive damages which the district Court originally imposed, and which this Court has stricken from the first judgment.

In all frankness, appellant Hohly is convinced that insofar as the district Court is concerned, it is intended that he be held liable for the same original judgment, plus the sum of the initial exemplary damages, plus an extra $8,500 or so; all rounded out to an even $55,000;

— an alarmingly excessive sum which if the result of a jury verdict, would clearly be deemed to reflect passion and prejudice.

Certainly, the Revised Judgment makes obvious that the district Court has used the original judgment of $31,566.25. as a starting point for assessing the current damages; for how else explain the fact that appellant Bank has been assessed the identical amount of the original judgment under the guise of conforming with the probate claim filed by appellee in Ben Sheldon's estate. After all, the claim as filed patently does not specify the sum $31,566.25; but rather, as is shown by this Court in the Opinion, page 161 footnote 1, is seeking payment for the value of 390.98 shares of Sheldon Co. stock — *whatever that value be.*

For all the reasons shown, this Honorable Court should again reverse the judgment and once more remand the matter to the district Court to determine the correct and proper amount of the judgment. Yet there must sometime be an end to litigation, and perhaps at this point *this Court may prefer to determine the proper amount of the damages for itself,* and issue a remittitur in that sum; thus finally concluding the matter. If so, there is precedent for such a procedure.

In *Alexander v. Nash-Kelvinator Corporation,* 261 F. 2d 187 (2nd Cir., 1958) the cause was similarly remanded to the trial Court for new findings of fact on the issue of damages. Subsequently that court expressed an unwillingness to modify the damages and prepared new findings which reiterated the same sum as before. After a second appeal, the Second Circuit

However, in the interest of avoiding further litigation, appellant Hohly, in concurrence with the other defendant appellants, will readily accept any final determination in respect to the amount of the damages made by this Honorable Court. In such an event, it is believed that this Court will wish to follow the formula and reach the result hereinbefore detailed.

Respectfully submitted,
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Attorneys for Appellant Robert Hohly.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Abe Mutchnik